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No. 11861

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, ERNEST JOSEPH STEWART, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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Preliminary Statement.

Appellant will not undertake to specifically answer each of the points argued by Appellees in their brief for the reason that all such arguments were anticipated and are completely refuted by Appellant's Opening Brief and it would unnecessarily lengthen this Reply Brief to re-argue.

I.

The Authorities Cited by Appellees Do Not Support Their Contentions.

A perusal of the cases cited by Appellees discloses that they do not support the contentions of Appellees. For instance, on page 28, it is argued that the granting of the Conditional Use Permit to Gregg constituted a taking

of Appellees' property, citing *Pacific Tel. & Tel. Corp. v. Eshleman,* 166 Cal. 640. But the case cited has nothing to do with the exercise of the police power in zoning matters. It is, rather, concerned with the taking of property by eminent domain proceedings.

Appellees also cite *People v. Ricciardi,* 23 Cal. 2d 390. That was also a condemnation case and merely held that interference with ingress and egress to a person's property arising by construction of a highway was a taking of property for which such property owner was entitled to damages.

Again, on page 29, Appellees cite the case of *Dobbins v. City of Los Angeles,* 41 L. Ed. 167, as authority for the proposition that once zoning has been established it may not be changed in the absence of some substantial change in conditions to justify it, to anyone's prejudice and detriment. That case does not so hold. In that case plaintiff Dobbins purchased property located in an area in which it was permissible to erect a gas works. Thereafter Dobbins expended a substantial sum of money in commencing the construction of a gas works. Whereupon, the City Council amended the ordinance so as to include the Dobbins property within an area in which such business was prohibited. The Court merely held that "Being the owner of the land and having partially erected the works, the plaintiff in error had acquired property rights, and was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law." The *Dobbins* case did not hold that a property owner has a vested right in the zoning of any property other than his own. It was the reverse of the situation in the case at bar.

It did not hold that a property owner has a vested right to prevent the use of property other than his own for any lawful purpose which might be permitted by governmental authority. That case did not hold that a municipality cannot issue a Conditional Use Permit authorizing a property owner to use *his own property* for a lawful purpose. The theory of the *Dobbins* case was simply the well established rule by which existing non-conforming uses are exempted from subsequent zoning which would have the effect of preventing the continuance of such existing non-conforming use. There is no such point involved in the case at bar and the *Dobbins* case is not authority in support of any of Appellees' theories.

Appellees also cite the case of *Jardine v. City of Pasadena,* 199 Cal. 64. In that case the Court simply held that a municipality has the right from time to time to change its zoning ordinances and that it is immaterial if the consequence of such rezoning is that the value of surrounding land for residential purposes might be depreciated. It held that such possiblity did not deprive the municipality of the exercise of its police power.

Other cases cited by Appellees include *Childs v. City Planning Com.,* 79 A. C. A. 996; *Patterson v. Board of Supervisors,* 79 A. C. A. 812; *Northside etc. Assn. v. County of L. A.,* 70 Cal. App. 2d 598, also, 609; *Miller v. Board of Public Wks.,* 195 Cal. 477; *Rubin v. Bd. of Dir.,* 16 Cal. 2d 119; *Abbey Land Co. v. City of San Mateo,* 167 Cal. 434, and *Heischelderfer v. Quinn,* 287 U. S. 345, 77 L. Ed. 331. Those cases are cited by Appellees as examples of their contention that adjacent property owners have a right to prevent a change in the zoning of their neighbor's property. An examination of

the cases cited discloses that they all hold merely that the Court will not substitute its judgment for the discretion vested by law in the municipal body acting in a quasi-judicial capacity in connection with the exercise of the police power in zoning matters.

The *Reichelderfer* case, *supra* (erroneously cited by Appellees as Heischelderfer) specifically holds that an adjoining property owner has no such right. A quotation from that decision is set forth at some length commencing at page 1 of the Appendix to *Appellant's* Opening Brief. In fact, all of the above cases cited by Appellees have been cited and quoted by Appellant in his Opening Brief as authority in support of *Appellant's contentions.* A reference to those cases discloses quite clearly that they do not support Appellees' contentions but are quite the opposite.

Without referring in detail to each of the other cases cited by Appellees, it suffices to say that an examination of each of the cases reveals that *none of them is authority for any of Appellees' contentions.* For instance, in six different places in Appellees' Brief they cite the case of *Times-Mirror Company v. City of Los Angeles,* 3 Cal. 2d 309, in support of the proposition that a City may be estopped in the exercise of its police power.

A reading of that case discloses that there is no similarity between the facts in that case and the facts in the case at bar.

Appellant believes that the application of the *Times-Mirror* case must be strictly limited to the peculiar facts out of which it arose, and that it is not an authority on the question of estoppel with reference to the exer-

cising by the municipality of its police powers in zoning matters. A reading of the *Times-Mirror* case reveals that the decision is based more on a theory of quasi-contractual relationship than it is upon a theory of equitable estoppel. That decision reveals that pursuant to a plan for the development of the Los Angeles Civic Center, the City and County agreed to acquire several parcels of land then held in private ownership, and further agreed with the State of California that if the latter would erect a new State Building at the place where it is now located, that the City and County would by purchase or by condemnation proceedings acquire the building and property of the *Times-Mirror Co.,* then located on the northeast corner of First and Broadway, and would cause title to the property to pass to the State of California. Resolutions were adopted by the Board of Supervisors and by the City Council, resolving "that the City of Los Angeles proceed under eminent domain with the acquisition of the properties . . ." The City and Times-Mirror Co. were unable to agree by negotiation to a valuation to be set upon its property, and condemnation proceedings were thereafter instituted by the City of Los Angeles. The sole issue in these proceedings was the value of the property and the price to be paid by the City of Los Angeles. No other issue was raised. A judgment was entered fixing the valuation, and the City of Los Angeles deposited in Court the amount of the judgment. An appeal was taken by the Times-Mirror Co., solely on the question of damages, and the judgment of the trial court in that regard was reversed by the Supreme Court, which ordered the case retried solely on the question of damages.

In the interim, the Times-Mirror Co. in reliance upon the resolutions adopted by the City Council and the Board of Supervisors, and in reliance upon the condemnation proceedings and the interlocutory judgment entered therein, had purchased the property at the corner of First and Spring Streets and had erected thereon at great cost the building which is now occupied by it. Meanwhile, the State of California, likewise in reliance upon the agreements with the City and County, had erected the new State Building. Thereafter and before the retrial of the case on the question of damages, the City of Los Angeles attempted to dismiss the proceedings and abandon said condemnation. Application was made to the Supreme Court for a writ of mandate to compel the Superior Court to proceed with the trial of the case. Such a writ was issued, the Supreme Court holding that because of the unusual circumstances of the case and the agreements and understandings by the City of Los Angeles and the County of Los Angeles and the State of California with reference to the development of the Civic Center, and with the Times-Mirror Co. with regard to the acquisition of its property, and the reliance by both the Times-Mirror Co. and the State of California upon such agreements that the City was estopped to dismiss the action.

Thus, it will be seen that the facts of that case are fully distinguishable from the case at bar, and that the theory of a quasi-contractual relationship, which was the basis of the decision of the *Times-Mirror* case, has no application under the facts of the case at bar.

The police power of a municipality cannot be bartered away even by express contract. (*Maguire v. Reardon,* 41 Cal. App. 596, 602.)

There is no doubt that the general rule is that estoppels will not be invoked against the government or its agencies except in rare and unusual circumstances. (*Aebli v. Board of Education,* 62 Cal. App. 2d 706, 729.) No such circumstances are here presented.

Again, we respectfully submit that the police power of the municipality with reference to zoning regulations cannot be usurped by the private individual under a set of facts as revealed by the record in the case at bar, and that if such a doctrine were recognized, it would lead to the inevitable result that all zoning regulations must remain static in the mold of the first zoning ordinance enacted. This is neither the spirit nor the intent of the law, and should be rejected.

There can be in the nature of things no vested right in an existing law which precludes its change or repeal; nor can there be a vested right in the omission of the governing body to legislate on a particular subject. In no case is there an implied promise on the part of the government to protect its citizens against incidental injury occasioned by changes in the law. Every citizen, in making his arrangements in reliance upon the continued existence of laws, takes upon himself the risk of their being changed, and the government incurs no responsibility nor can there be any estoppel arising in consequence of any such change causing incidental injury to the private interests of a citizen. (*Middleton v. Texas Power and Light Company,* 249 U. S. 152, 63 L. Ed. 527; *E. Saginaw Co. v. E. Saginaw,* 19 Mich. 259.)

II.

In Accepting Jurisdiction the District Court Erred Both Under the Provisions of Section 265 of the Judicial Code (28 U. S. C. A. 379) and Under the Doctrine of Comity.

Appellant in his Opening Brief (pp. 51-62), contended that the District Court should have declined to take jurisdiction because of a prior suit which had been brought in the Superior Court of the State of California in and for the County of Los Angeles by twenty-six plaintiffs acting in their own behalf and also on behalf of all others similarly situated. The State action involved the identical subject matter as the case at bar.

It is Appellant's contention that the State suit was a representative suit and that the Appellees in the case at bar, being of the class represented are bound by the judgment of the State Court. Therefore, the District Court under the doctrine of comity should have declined jurisdiction. This matter is argued at some length in Appellant's Opening Brief supported by citations of authority and it is not therefore necessary to re-argue the matter here.

However, in view of the fact that Appellees refuse to concede that the State action was a representative suit and that the judgment therein is binding upon Appellees, we wish to invite the attention of the Court to the case of *Rodman v. Rogers,* 109 F. 2d 520, in which the Circuit Court of Appeals, Sixth Circuit, considered this identical question and decided against Appellees' contention. In so doing, the Court stated:

> "This is an appeal from an order of the District Court dismissing appellants' petition on the ground

that an earlier decision by a Kentucky court was an adjudication of all the rights of the parties hereto. In November, 1936, Joseph H. Gibson and eleven other property owners brought suit in the Circuit Court of Jefferson County, Kentucky, against Ralph Rogers, doing business as the Louisville Crushed Stone Company, to restrain him from injuring their property by shooting blasts of dynamite or other explosives in the operation of his limestone quarry. Each of the plaintiffs in that suit resided within one thousand feet of the quarry. An injunction issued permanently restraining Rogers from discharging blasts of any explosive that would injure the property of any of the plaintiffs or interfere with the comfortable and reasonable enjoyment of their homes, and that injunction was sustained by the Court of Appeals of Kentucky. See Rogers v. Gibson, *et al.*, 267 Ky. 32, 101 S. W. 2d 200.

"In March, 1937, the same plaintiffs filed a motion in the same court alleging that Rogers had violated the injunction. The court held otherwise, and in due time that decision was affirmed. See Gibson v. Rogers, 270 Ky. 159, 109 S. W. 2d 402.

"On April 17, 1937, Rogers moved the appointment of a commissioner to go upon his quarry property, observe the loading of all blasts, and particularly the amount of explosive used in each, and the time of shooting it. This motion was opposed by the plaintiffs in the former proceedings, but the Court appointed one Edward P. Voll as commissioner and directed him to make bi-weekly reports upon his observations. His appointment is still in effect, and he has rendered detailed reports as ordered.

"In May, 1937, Rogers incorporated under the law of Delaware as The Louisville Crushed Stone Company, Inc.

"The plaintiffs herein, a different set of property owners, filed this suit on July 28, 1938. All of them live in the vicinity of appellee's quarry, not nearer than 3,700 feet thereto and northeasterly thereof, instead of southwesterly, as did the plaintiffs in the suit in the state court. They allege herein a continuance of explosions and the same types of consequent injury as were alleged in the first suit. In addition, they allege injury in several respects resulting from the clouds of dust and noise with which the air is filled in consequence of the operation of a rock crusher, a metal screen for sorting the crushed rock, a mechanical loading device and trucks. But they allege that, during all of said times'—from the beginning of the quarry operations to the filing of the bill—these devices have been operated with the injurious consequences aforesaid; and they prayed that appellees be permanently enjoined from so injuring their property.

"The District Court sustained appellees' plea that the judgment in the state court was *res judicata* as to all matters alleged by appellants.

"Appellants contend that there is no such identity of parties or cause of action as will support the District Court's order.

"With this contention we cannot agree.

"When one succeeds to the interest of another against whom an injunction has issued and has knowledge of the terms of the injunction, he is as much bound by it as was the other against whom it issued. State v. Will, 86 Kan. 561, 121 P. 362; Cf. Rivera

et al. v. Lawton, 1 Cir., 35 F. 2d 823; C. & C. Merriam Co. v. Saalfield, 6 Cir., 190 F. 927; Zip Mfg. Co. v. Pep Mfg. Co., 6 Cir., 27 F. 2d 219. Hence, Rogers' incorporation as The Louisville Crushed Stone Company, Inc., and the transfer of his quarry property are of no consequence in so far as the issue of *res judicata* is concerned. The corporation is bound by the injunction to the same extent as is Rogers.

"Nor is it of consequence as contended by appellants, that none of the nominal parties plaintiff in the first suit is a plaintiff herein. When property owners are similarly injured by a nuisance, they constitute a class, and, if one or more of them is designated to act for the class in bringing a suit to abate the nuisance, a judgment rendered therein is binding upon the class. Smith v. Swormstedt, 16 How. 288, 14 L. Ed. 942; McIntosh v. City of Pittsburg, C. C., 112 F. 705, *Cf.* Barrett v. Vreeland, 168 Ky. 171, 182 S. W. 605. Appellees alleged in their plea in abatement that appellants herein conferred with and selected the plaintiffs in the first suit because their properties were nearest to the quarry, and they further allege that appellants assisted and supported plaintiffs in the maintenance of the first suit. These facts being undenied and only their legal sufficiency questioned, we conclude that appellants' interests were adjudicated in the first suit. See Hopkins v. Jones, 193 Ky. 281, 235 S. W. 754.

"But appellants urge that the complaint and injunction in the first suit were limited to blasting and the

consequent injuries to their properties, such as the cracking of plastering, foundations and sidewalks, and such vibration or shaking of their homes as interfered with the comfortable or reasonable enjoyment thereof, whereas the complaint in this suit adds to the foregoing the operation of the rock crusher, screening and loading devices and trucks, with such consequent filling of the air with dust and noise as injures their property and interferes unreasonably with its comfortable enjoyment. Not only do appellants not claim that the operation of these devices is new, but they allege that from the beginning these devices have been thus operated to their injury; they merely add here the annoyances of dust and noise, which could have been included in the first suit.

"One may not split a cause of action and bring separate suits upon its parts; a judgment is *res judicata* not only as to such elements of a cause of action as were actually litigated but as to those which might have been determined as well. Baltimore Steamship Co. v. Phillips, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069; Davis, Trustee v. Mabee, 6 Cir., 32 F. 2d 502; Nolan v. City of Owensboro, 6 Cir., 75 F. 2d 375; Dern v. Tanner, 9 Cir., 96 F. 2d 401; Brunn v. Hansen, 9 Cir., 103 F. 2d 685. *Cf.* United States v. California & Oregon Land Co., 192 U. S. 355, 24 S. Ct. 266, 48 L. Ed. 476.

"Appellants have argued that, because the judgment of the Kentucky court was *in personam,* as distinguished from *in rem,* the federal court was not precluded from taking jurisdiction in this case, and

appellees have contended that the state court acquired jurisdiction of the *res* by the appointment of its special commissioner to report upon appellee's blasting operations.

"It is unnecessary to consider either of these contentions, since the doctrine of *res judicata* is applicable and controlling whether the judgment in the first case was *in personam* or *in rem.*

"The order of the District Court is affirmed."

The attention of the Court is invited to the fact that the complaint in the State case involved herein alleges that the action was being brought on behalf of the named plaintiffs "and all others similarly situated on whose behalf this action is also begun and is maintained." [Tr. Vol. II, p. 351, fol. 130]. Furthermore, the affidavit of J. D. Gregg in opposition to the application for preliminary injunction alleges as follows:

"That affiant is informed and believes and therefore alleges the fact to be that the real parties in interest in Superior Court Case No. 522031 and the real parties in interest in the within action No. 7765-PH are one and the same and that both of said actions have been and now are being prosecuted for the benefit of the same persons." [Tr. Vol. I, p. 287.]

This allegation in Mr. Gregg's affidavit is not denied according to the record.

It is also significant that the plaintiffs in both the State suit and in this suit are represented by the same counsel and the fact that the complaint in this suit [Tr.

Vol. I, pp. 40 to 44, incl.] names all of the plaintiffs in the State suits as owners of property in the vicinity of the Gregg land who are affected by the subject matter of the action.

We respectfully submit that the facts in the *Rodman* case, *supra,* are identical with the facts in the case at bar and that the District Court should not have accepted jurisdiction. It, therefore, follows that the issuance of a preliminary injunction was an abuse of discretion.

Respectfully submitted,

DONALD J. DUNNE and
WOOD, CRUMP, ROGERS, ARNDT & EVANS,
Attorneys for Appellant.

NOTE: A typographical error in Appellant's Opening Brief has come to our attention. On page 62 the language "abused its discrimination in granting a preliminary injunction" should be "abused its discretion in granting a preliminary injunction."